

No. 89-662

**IN THE SUPREME COURT
OF THE
UNITED STATES**

October Term 1989

MIDDLE EARTH GRAPHICS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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4/2/89



DISCUSSION

Petitioner contends that the National Labor Relations Board (Board), in finding that Petitioner had violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act), improperly relied on Petitioner's promotional poster brochure (Petition for Writ of Certiorari, Appendix F, p. 65a), which is protected speech under Section 8(c) of the Act, 29 U.S.C. 158(c). In its brief in opposition, however, the Board now maintains that Petitioner failed to raise that issue before the Board and thus, Section 10(e) of the Act, 29 U.S.C. 160(3), bars judicial review of that issue.

Respondent's contention is simply incorrect. On August 5, 1986, in case number 7-CA-24013 *et al.*, Petitioner filed timely Exceptions to the Administrative Law Judge's decision to the Board. Such filing was made pursuant to the Board Rules and Regulations, 29 C.F.R. part 102.46. Both Exception 41 and Exception 42 specifically addressed the issue:

EXCEPTIONS TO THE DECISION

<u>No.</u>	<u>Page and Lines</u>	<u>Exception</u>
41	p. 17; lines 8-34	To the characterization of the poster submitted as a Respondent exhibit as evidencing anti-union animus on the part of Respondent.

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p. 17; lines 33-34

To the failure to find that Hall's statement that he was opposed to unions "just in six-one-six" was a tongue and cheek response in the same vein as the poster itself.

On May 19, 1987, the Board affirmed the decision of the administrative law judge after considering his decision and the record, "in light of the *exceptions* and brief" of Petition herein (Petition for Writ of Certiorari, Appendix C p. 3a). (Emphasis supplied).

On March 1, 1988, the Board filed a Petition for Enforcement with the U.S. Court of Appeals for the Sixth Circuit. On September 21, 1988, Petitioner filed a timely brief with the Sixth Circuit which again raised the issue regarding the use of the poster to establish evidence of anti-union animus. On November 8, 1988, the Board filed its brief with the Sixth Circuit. The Board claimed that such use of the poster was permissible and did not claim that the issue was waived by Petitioner.

On April 24, 1989, the Sixth Circuit issued a *Per Curiam* decision enforcing the Board's Order. (Petition for Writ of Certiorari, Appendix B. p.2a). On May 5, 1989, Petitioner filed a timely Petition for Rehearing with the Sixth Circuit, which again raised the issue regarding the use of the poster to establish evidence of anti-union animus. On June 15, 1989, the Board filed its Response to the Petition for Rehearing and again addressed the issue on the use of the poster. Again the Board did not claim that Petitioner had waived that issue.

Petitioner's claim that the Board improperly relied upon Petitioner's promotional brochure, which is protected speech under section 8(c) of the Act, to establish evidence of anti-union animus, was urged at all levels of review, and thus, judicial review of that issue is in no way barred. *See Detroit Edison Company v. NLRB*, 440 U.S. 301, 311, (1979), *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

The case is therefore ripe for consideration by the Court and presents a clear vehicle for determination on the use of protected free speech as background evidence to establish anti-union animus.

DATED: January 2, 1990

By:



SCOTT R. MERRILL
Counsel of Record

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